

# INSTITUTIONALIZING ECONOMIC JUSTICE: A LATCRIT PERSPECTIVE ON THE IMPERATIVES OF LINKING THE RECONSTRUCTION OF "COMMUNITY" TO THE TRANSFORMATION OF LEGAL STRUCTURES THAT INSTITUTIONALIZE THE DEPOLITICIZATION AND FRAGMENTATION OF LABOR/COMMUNITY SOLIDARITY

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The long and unwieldy title of this essay reflects the complex range of issues implicated in any project designed to promote the effective participation of labor/community coalitions in the process of progressive social transformation. The decision of the *University of Pennsylvania Journal of Labor and Employment Law* to organize a unique gathering of community leaders, activists, labor organizers, law professors, and social scientists provided a particularly valuable opportunity to advance this project because it focused attention on two specific case studies in which effective labor/community coalitions were indispensable to the success of union organizing and collective bargaining efforts.<sup>1</sup> The Greensboro case study recounts the struggles waged by warehouse workers and community leaders to combat the abusive employment practices of a Kmart distribution center in Greensboro, North Carolina, while the New Haven case study recounts a series of labor/community struggles over the anti-union practices of Yale University and of the OMNI at Yale.<sup>2</sup>

My purpose in this essay is to contextualize these two case studies in a

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1. See Symposium, *Activism and the Law: The Intersection of the Labor and Civil Rights Movement*, 2 U. PA. J. LAB. & EMP. L. 617, 617-806 (2000). Professor Susan Sturm did a wonderful job of structuring a group process that enabled genuine substantive exchange among a wide variety of participants and perspectives.

2. See Dorian T. Warren & Cathy J. Cohen, *Labor/Civil Rights Coalitions: A Case Study of New Haven*, 2 U. PA. J. LAB. & EMP. L. 629 (2000); Penda D. Hair, *Prayer and Protest in Greensboro, North Carolina: Bringing Community Visions of Justice to Kmart's Treatment of its Workers*, 2 U. PA. J. LAB. & EMP. L. 657 (2000).

way that reflects some of the basic theoretical and political advances that currently are converging in the LatCrit movement.<sup>3</sup> Rather than forward a general or abstract description of LatCrit theory and its social justice agendas, my purpose is to suggest specific points of convergence between LatCrit theory and the effort to promote more effective labor/community coalitions by focusing specifically on the lessons these two case studies offer when examined through a LatCrit perspective.

Like any complex socio-legal phenomenon, the events described in the Greensboro and New Haven case studies are subject to conflicting interpretations. Since its inception, LatCrit theory has sought to engage such interpretative conflicts in a way that prioritizes the pursuit of inter-group justice. This priority placed on inter-group justice is reflected in the substantial efforts made by LatCrit scholars to articulate a common context of struggle across the variety of inter-group differences,<sup>4</sup> to reveal the particularities of perspective and position reflected in the construction of

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3. LatCrit scholarship, which is devoted to Latina and Latino Critical Legal Theory, has virtually exploded in the last four years. In addition to the published proceedings of LatCrit I, II, and III, LatCrit scholars have also produced a first-ever Symposium exploring key issues in international law and international human rights from a critical race perspective. See Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997) (LatCrit I); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998) (LatCrit II); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. 575 (1999) (LatCrit III); Symposium, *International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177 (1997). LatCrit scholarship has also been published in a stand-alone volume. See Symposium, *LatCrit Theory, Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1998). For proceedings of the gathering of Latina/o Law Professors that gave birth to the LatCrit project, see Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L. J. 1 (1996). For a particularly insightful overview of the purposes and commitments of the LatCrit movement see Francisco Valdes, *Under Construction: LatCrit Consciousness, Community and Theory*, 85 CAL. L. REV. 1087, 1093-96 (1997), 10 LA RAZA L.J. 1, 7-10 (1998) [hereinafter *Under Construction*]. For proceedings of the LatCrit IV conference see Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000).

4. See Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latina/o Critical Theory*, 40 B.C. L. REV. 349, 352-53; 19 B.C. THIRD WORLD L.J. 349 (1998) [hereinafter *Out of the Shadow*] (articulating common context of struggle for Latinas/os and Asian Pacific Americans around three points of reference: (1) the centrality of international relations; (2) national security ideology; and (3) inter/national political economy on the re/production of inter and intra-group subordination among Latinas/os and APAs); George A. Martinez, *African Americans, Latinos, and the Construction of Race: Toward an Epistemic Coalition*, 19 CHICANO-LATINO L. REV. 213, 214 (1998) (urging Latinas/os to explore commonalities with African Americans); Ediberto Román, *Common Ground: Perspectives on Latina-Latino Diversity*, 2 HARV. LATINO L. REV. 483, 483-84 (urging Latinas/os to focus on our similarities rather than our differences as a way of promoting intragroup justice and pan-ethnic solidarity).

individual and collective interests,<sup>5</sup> and to subject these particularities to an anti-essentialist critique that is increasingly demanding and all-encompassing in its commitment to revealing and eradicating all forms of subordination within and between the various overlapping communities we inhabit.<sup>6</sup>

In this vein, the title of this essay provides a launching point for the articulation of the three themes that are of central importance in engaging the issues raised by the New Haven and Greensboro case studies from a LatCrit perspective. First, in the title of this article, I place "community" in quotation marks to emphasize that the meaning of "community" is not a stable, given referent. On the contrary, it is highly contested and reflects the many competing agendas both in the struggle to promote more effective labor/community coalitions and in the more general LatCrit struggle to articulate and effectuate a vision of human interconnection that can effectively transcend the essentialist assumptions and transform the inherited forms of identity politics that are simultaneously embedded in, and activated by, such modern categories as race, class, gender, and nation.<sup>7</sup>

In the words of Reverend Nelson Johnson, a leading figure in the efforts to marshal community support for the Kmart workers in Greensboro, the workers' struggle was a God-sent gift because it "stirred a stumbling, bumbling people just enough to stand up and try to discover what it means to be human, what it means to call *a community into being a community*."<sup>8</sup> The meaning of "community" embedded in this observation

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5. See Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship* 2 HARV. LATINO L. REV. 101 (1997) [hereinafter *Latino Legal Scholarship*] (exploring the possibilities and problems confronting projects to promote Latina/o pan-ethnic solidarity); Athena Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855 (1999); Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495 (1997) (urging more expansive inter-racial alliances based on mutual and reciprocal commitments to intergroup justice).

6. See Francisco Valdes, *Afterword: Theorizing "OutCrit" Theories: Coalitional Method and Comparative Jurisprudential Experience RaceCrits, QueerCrits and LatCrits*, 53 U. MIAMI L. REV. 1265 (1999).

7. See *Out of the Shadow*, *supra* note 4, at 352-53 (linking the construction of "dynamic and authentic community" both to the articulation of inter-group commonalities as well as to the respectful embrace of inter-group differences); Elizabeth M. Iglesias, *Foreword: Democracy, Identity, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 576-81 (1999) [hereinafter *Foreword: LatCrit III*] (noting many challenges confronting LatCrit efforts to envision and construct a genuine community based on shared commitment to an anti-essentialist vision of anti-subordination politics and to relentless pursuit of inter and intra-group justice).

8. Hair, *supra* note 2, at 657 (emphasis added); see also Nelson Johnson, *Reflections*

may be intuitively obvious to some, but impenetrable to others. This is precisely because Reverend Johnson's reference to "community" in this context implies a conscious acknowledgment of human interconnection and a generous and genuine embrace of the mutual obligations that this interconnection implies. This vision of community cannot help but to profoundly challenge the dominant economic, political, and cultural processes that have long been restructuring the experiences of "communities" throughout this country and beyond. From the ghost towns of the abandoned rust-belt, through a geography of nowhere, to the empty meeting grounds constructed precisely to incite the superficial encounters that increasingly define the daily lives of the ever more self-centered subjects produced by, and for, anarcho-capitalism,<sup>9</sup> the struggle for "community" in the United States has been an uphill battle against the material interests, cultural ideologies, and structures of economic and political power that are deeply invested in transforming human communities into "built environments."<sup>10</sup>

As built environments, communities operate as profit-maximizing centers for the production and accumulation of capital by some classes, at the expense of others. Rather than promoting human flourishing and solidarity, a community reduced to its built environment becomes the site for complex and shifting inter- and intra-class conflicts among various factions of labor and capital.<sup>11</sup> Against the backdrop of this acquisitive

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on an Attempt to Build "Authentic Community" in the Greensboro Kmart Labor Struggle, 2 U. PA. J. LAB. & EMP. L. 675 (2000).

9. See, e.g., JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993); DEAN MACCANNELL, *EMPTY MEETING GROUNDS: THE TOURIST PAPERS* (1992).

10. See David Harvey, *Labour, Capital, and Class Struggle Around the Built Environment in Advanced Capitalist Societies*, in *CLASSES, POWER, AND CONFLICT: CLASSICAL AND CONTEMPORARY DEBATES* 545-61 (Anthony Giddens & David Held eds., 1982) (illustrating how the concept of "the built environment" enables a critical analysis of the inter-class conflicts that are structured around the development of inhabited physical space).

11. See *id.* In this important article, David Harvey performs a class analysis of the competing interests at stake in the struggle to control and appropriate the surplus values produced through the construction and commodification of the built environment. To this end, his article maps how the struggle over the built environment structures the dynamics of *intra-class* conflict between home-owning factions of labor and their propertyless counterparts, see *id.* at 550-52, and between landlords, mortgage financiers and construction companies, see *id.* at 547-50, as well as the dynamics of *inter-class* conflict between labor and capital, see *id.* at 556-61. This analysis is tremendously significant not only because it reveals the materialist interests at stake in any "community development" project, but also because it reveals why labor and community groups are always potentially in conflict, both with each other and within their own respective organizations. This intra and inter-group conflict results from the way differential access to the surplus values of the built environment tends to produce internal stratifications of privilege and dispossession, both among workers and throughout the broader community. Though a fuller articulation of

selfishness, Reverend Johnson's suggestion that the Kmart workers' struggle for economic and racial justice should be interpreted as a God-sent call to action is a profoundly disruptive idea. Even more, to proactively urge the otherwise demobilized, disaggregated, and defeated people of Greensboro to take concerted action, to provide each other with mutual support, and thereby to become "*a community*" is to take a step that directly repudiates, and positions its proponent against, the awesome power wielded by those forces that have worked so hard to reduce the practice of "community development" to a profit-maximizing enterprise dictated by the imperatives of anarcho-capitalism and possessive individualism.

Viewed in this light, the challenge presented by any project to promote cooperative labor/community coalitions is ultimately a challenge to manifest a different consciousness of the meaning of "community." What is needed is a consciousness that grounds the meaning of community in the practice of inter-group justice and grounds the practice of inter-group justice in a recognition and affirmative embrace of the many interconnections linking the various groups into which our identities and communities have too often been fragmented.<sup>12</sup>

From this perspective, the events recounted in the Greensboro and New Haven case studies suggest important points of intersection and convergence between LatCrit theory and the struggle to promote more effective labor/community coalitions. This is so because the collective production of new understandings of the meaning of "community" has been a central concern in the evolution of LatCrit theory. LatCrit theory seeks to articulate a broad and inclusive vision of anti-essentialist and anti-subordination inter-group solidarity. It seeks to manifest and effectuate this vision in the organization of LatCrit activities and through the performance of the LatCrit community.<sup>13</sup> Given these points of intersection and

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these matters is beyond the scope of this essay, Harvey's materialist analysis has important implications for the project to promote effective labor/community coalitions. These implications are well worth further exploration, particularly in conjunction with current efforts to center class in LatCrit theory. See, e.g., *infra* notes 93-97 and accompanying text.

12. See Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395, 401-03 (1993) [hereinafter *Structures of Subordination*] (revealing how essentialist categories of race and class that organize American labor and employment law regimes enable women of color to be both excluded from, and/or submerged within, majoritarian labor unions—thus making the struggle for collective recognition a matter of unifying the identity configurations that have been fragmented and fragmenting the identity configurations that have been unified through the deployment of these essentialized categories); see also *Foreword: LatCrit III*, *supra* note 7, at 629 (arguing that "a genuinely anti-essentialist politics promises, always and everywhere, to reconstitute [any] group as a universal that contains all particulars" and exploring implications for the way we should construct group identities and align intergroup solidarity).

13. See Elivia R. Arriola, *Foreword: March!*, 19 CHICANO-LATINO L. REV. 1, 11-12

convergence, LatCrit scholars and activists must carefully examine and seriously engage these labor/community struggles, and the broader aspirations to which they give substance, even as labor leaders and community activists will undoubtedly benefit from a deeper involvement in the LatCrit movement.<sup>14</sup>

The title of this essay reflects a second theme that is particularly salient to the articulation of a LatCrit perspective on any project to promote effective labor/community coalitions. Though the future of LatCrit theory may evolve along as many trajectories as its proponents are determined to pursue, it began as an intervention in *legal* theory, focusing specifically on the role of law in the process of achieving social justice.<sup>15</sup> Accordingly, this essay links the reconstruction of "community" to the deconstruction of legal frameworks and, more specifically, to the deconstruction of those legal structures that are most directly responsible for the de-politicization and fragmentation of labor and community solidarity. The theoretical claim implicit in this formulation is that the fragmentation of labor and community is not only a matter of "false consciousness" or of cultural ideologies, but also of legal doctrines and structures.

Legal doctrine is an important field of contestation. Legal interpretation articulates substantive norms and organizes decisional processes that directly and indirectly allocate power among competing groups across every institutional arrangement that today constitutes the American political economy.<sup>16</sup> By institutionalizing relations of differential power among competing interests and social agents, law organizes institutional class structures.<sup>17</sup> Revealing the relationship

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(1998) (discussing the importance of respect for diversity and commitment to conflict resolution in the context of LatCrit community building); Berta Esperanza Hernández-Truyol, *Building Bridges: Latinas and Latinos at the Crossroads*, in *THE LATINO/A CONDITION: A CRITICAL READER* 24, 30-31 (Richard Delgado & Jean Stefancic eds., 1998) (noting many ways Latinas/os can tap into the experience of intersectionality and multidimensionality to build bridges across differences both within Latina/o communities and between Latina/o and other minority communities); *Out of the Shadow*, *supra* note 4, at 351-58 (urging Latinas/os to explore commonalities with Asian Pacific Americans); *Latino Legal Scholarship*, *supra* note 5 (exploring the possibilities and problems confronting project to promote Latina/o pan-ethnic solidarity); Martinez, *supra* note 4; Yamamoto, *supra* note 5.

14. See Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1098-1104 (1999) [hereinafter *The Labyrinth of Solidarity*] (arguing that the future of the American labor movement and Latinas/os are inextricably interconnected).

15. See *Under Construction*, *supra* note 3, at 7.

16. See, e.g., *Structures of Subordination*, *supra* note 12, at 407-67 (examining the structure of institutional power constructed through judicial articulation of the doctrine of exclusive representation and its demobilizing impact on women of color in the workplace).

17. See, e.g., Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional*

between the de-politicization and fragmentation of labor and community groups on the one hand, and the legal production of these institutional class structures on the other, is a critically important project. This is because the legal production of institutional class structures plays a major role in suppressing the mobilization of new collective solidarities and in the formation of anti-essentialist political identities. These potential solidarities and identities remain hostage to the institutional class structures embedded in and reproduced through the articulation of essentialist categories of identity and community. These categories permeate the interpretation of legal doctrine and, thus, determine the adjudicated outcomes of institutional class conflicts over the configuration of institutional power.<sup>18</sup> Thus, from a LatCrit perspective, any project to promote effective labor/community coalitions must confront and combat the role of law and legal interpretation in institutionalizing relations of power and powerlessness that demobilize the collective identities and disorganize the inter-group solidarities on which labor/community coalitions must depend for survival.

The third and final dimension of the project I see embedded in the New Haven and Greensboro case studies reflects the fact that achieving social, economic, and racial justice is ultimately a matter of *institutionalizing* an alternative regime of substantive norms and decisional procedures that can more fairly mediate the competing interests and claims in the struggle for new relationships between labor, communities, and capital. Consciousness-raising may inspire and mobilize the coalescence of new political identities and collective solidarities. Deconstructive theory may reveal the hypocrisies and instabilities of current legal regimes. Ultimately, however, both our raised consciousness and our deconstructive practices must help produce new institutional arrangements that are genuinely inclusive, anti-essentialist, and participatory.

Part I of this Article sets the project of promoting effective labor/community coalitions against the backdrop of three converging dynamics: (1) the intensification of inter-capitalist competition in an increasingly internationalized political economy; (2) the labor movement's

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*Class Analysis*, 45 VILL. L. REV. (forthcoming 2000) [hereinafter *Global Markets, Racial Spaces*] (introducing and explaining "institutional class analysis" as interpretative methodology linking internal doctrinal deconstruction to external critical analysis of the role of law in configuring relations of institutional power/lessness, de/constructing political identities, de/mobilizing collective action, and re/producing socioeconomic and political subordination).

18. See, e.g., *Structures of Subordination*, *supra* note 12, at 402 n.23 (noting that "essentialism" is not just a theoretical approach, but "also a constitutive principle" of the institutional structures that organize and allocate power among different groups in particular contexts—as demonstrated by the powerlessness and marginality produced by the complete and total failure to recognize women of color as legitimate collective political identities in the interpretative practices at the intersection of Title VII and the NLRA).

history of racism, sexism and business unionism; and (3) the judicial articulation and enforcement of an ideology of managerial discretion. These three dynamics converge in the divide and conquer practices through which the legally sanctioned hyper-mobility of capital has enabled the American economic elite to fragment the working class and pit communities against each other in a life or death competition for business investments.<sup>19</sup>

These three dynamics are clearly evident in the New Haven and Greensboro case studies and reveal the extent to which the fragmentation of labor and community is grounded in a material base of economic and political power. Labor/community coalitions may, indeed, suffer from the "false consciousness" produced by truncated notions of "community" and inherited patterns of identity politics. However, they also suffer from the divisive practices through which the American business elite have chosen to respond to increased inter-capitalist competition. The problems confronted by these two particular communities reveal the cumulative impact of these general dynamics on local communities. Since every effort to promote labor/community coalitions must contend with the impact of these general dynamics, the New Haven and Greensboro case studies provide valuable points of reference for identifying, confronting, and combating the particular ways in which these three dynamics are at work in the local histories and current difficulties of local communities throughout this country.

Part II briefly focuses on some of the key legal doctrines through which judicial ideology has indirectly promoted and, in various instances, directly coerced the de-politicization and isolation of the labor movement. The project to promote more effective and authentic labor/community coalitions must not only contend with the fact that the fragmentation of labor and community solidarity has a *material base* in the divisive tactics and awesome power of business elites, but it must also contend with the fact that this inter-group fragmentation has a *legal base* in the interpretative decisions through which courts reproduce institutional class structures of the American political economy.

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19. See, e.g., CHICAGO: RACE, CLASS, AND THE RESPONSE TO URBAN DECLINE 16-17 (Gregory D. Squires et al. eds., 1987) [hereinafter CHICAGO] (critiquing dominant "growth ideology" as an obstacle to growth). According to the editors, the incentives through which cities and states seek to promote economic development have failed. "Tax abatements, low interest loans, industrial revenue bonds and a variety of other financial incentives have become favorite tools for economic development officials." *Id.* at 16. But these types of incentives have not been effective in attracting or creating jobs. "As municipalities and states attempt to outbid each other with such incentives, businesses benefit by receiving an ill-conceived subsidy. But no net gain in jobs occurs, tax revenues and public services decline, and as a result some communities find the business climate even less attractive than before the unaffordable incentives were offered." *Id.* at 16-17.



My objective in Part II is to map some of the ways in which labor/community coalitions are suppressed by the structural constraints established through the fragmentation of domestic legal regimes like Title VII and the NLRA.<sup>20</sup> Both labor and community struggles for increased control over, and participation in, the decision making processes through which economic elites relocate businesses and allocate capital have also been severely hampered by a discursive legal structure in which the separation of politics and economics is routinely invoked to restrict democratic participation in economic decision making.<sup>21</sup> The significance of this analysis is that it reveals the extent to which labor/community fragmentation is an unsurprising "real world" consequence of the doctrines articulated in the field of legal interpretation. This link between the fragmentation of labor/community solidarity and the articulation of legal doctrine makes critical legal theory a crucial element in the process of transformation.<sup>22</sup> The essay concludes with some brief reflections on the kinds of legal reforms needed to enable the sorts of proposals forwarded by Warren and Cohen in the New Haven case study.<sup>23</sup>

#### I. THE DIVISION OF LABOR, THE DISINVESTMENT OF COMMUNITIES AND THE MATERIAL BASE OF ANARCHO-CAPITALISM

The obstacles confronting workers and their communities in places like Greensboro and New Haven are intricately tied to the various strategies through which United States companies have sought to redesign the social relations and structures of production in individual firms and throughout entire industries. By the late 1970s, the decreasing competitiveness of

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20. See *infra* notes 66-91 and accompanying text. For a more extensive critique of the doctrine of exclusive representation and its role in producing the political fragmentation of both the labor and the civil rights movements, see *Structures of Subordination*, *supra* note 12. It is worth noting that the politics of fragmentation are also evident in the fragmentation of international and domestic legal regimes. See Elizabeth M. Iglesias, *Foreword: International Law, Human Rights and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 180-82 (1997) [hereinafter *Foreword: International Law*] (arguing that international advocacy and cross-national solidarities are undermined by fragmentation of international and domestic legal regimes).

21. See Elizabeth M. Iglesias, *Confronting Racial Inequality: LatCrit Reflections on Law, Class and the Anti-Political Economy* (unpublished work-in-progress, on file with author) [hereinafter *The Anti-Political Economy*] (noting that the "anti-political economy" refers to the structures of power that are legally produced by the rhetorical manipulation of the separation of politics and economics in ways calculated to legitimate both the exclusion of social justice concerns and democratic participation from the realm of "the market" and the penetration and domination of the political realm by economic power).

22. For further reflections on the contributions Critical Race Theory, understood specifically as a practice in the production of legal theory, can make to anti-subordination struggles for social justice, see *Global Markets, Racial Spaces*, *supra* note 17.

23. See Warren & Cohen, *supra* note 2, at 654-55.

American manufacturers, both internationally and in domestic markets, at last sent shock waves through the once complacent power centers of corporate America. Key decision makers began to recognize the emergence of new international competitors, to reassess their comparative advantages, and to experiment with new practices aimed at adapting American companies to the changed environment of international competition.<sup>24</sup>

These business practices have had, and continue to have, a profound effect on the structure of production and income distribution in the United States.<sup>25</sup> Some of the most definitive economic phenomena of the 1980s and 1990s can be traced to these practices. Plant closings and relocations, increased poverty, and the growing segmentation of the American labor market, in which work is divided into distinct, discontinuous, and differentially privileged sectors where individual mobility between sectors is increasingly restricted,<sup>26</sup> can all be linked to strategic management

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24. Compare, e.g., SAMUEL BOWLES ET AL., *AFTER THE WASTELAND: A DEMOCRATIC ECONOMICS FOR THE YEAR 2000* (1990) (providing historical context and critical analysis of the ascendancy of right wing economic policies and their impact on human needs), SEYMOUR MELMAN, *THE PERMANENT WAR ECONOMY: AMERICAN CAPITALISM IN DECLINE* (Revised ed. 1985) (attributing the decline of American competitiveness to waste and inefficiencies of "the war economy"), and THE CUOMO COMMISSION REPORT (1988) (challenging the neoliberal economic agenda and offering alternative policy proposals aimed at balancing short-term profit maximization with long-term sustainable economic growth), with ROSABETH MOSS KANTER, *CHANGE MASTERS: INNOVATION AND ENTREPRENEURSHIP IN THE AMERICAN CORPORATION* (1983) (articulating and celebrating a "post-modern" ideology of business Entrepreneurship and competitive initiative as a solution to "satisficing" complacency and bureaucratic inertia reportedly responsible for the decline of American core industries).

25. See, e.g., IN THE BARRIOS: LATINOS AND THE UNDERCLASS DEBATE (Joan Moore & Raquel Pinderhughes eds., 1993) (exploring the impact of economic restructuring on different Latina/o communities in the United States); Michael Knoll, *Perchance to Dream*, 66 S. CAL. L. REV. 1599 (1993) (discussing the effect of economic globalization on domestic income distribution and the disappearance of the middle class). For accounts of the impact of economic restructuring on Latina/o workers in Latin America, see Catherine T. Barbieri, *Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreement on Women Workers in Argentina and Chile*, 17 COMP. LAB. L. 526 (1996); Manuel Fuentes Muniz, *The NAFTA Labor Side Accord in Mexico and its Repercussions for Workers*, 10 CONN. J. INT'L L. 379 (1995) (examining the impact of U.S. style of industrialization on Mexican workers); see also TOM BARRY, *ZAPATA'S REVENGE: FREE TRADE AND THE CRISIS IN MEXICO* (1995).

26. See generally, SUZANNE BERGER & MICHAEL J. PIORE, *DUALISM AND DISCONTINUITY* 23-26 (1980) (explaining the theory of dual labor markets); Michael J. Piore, *Notes Toward Segmented Labor Market Theory*, in *LABOR MARKET SEGMENTATION* 125-50 (Richard C. Edwards et al. eds., 1975) (explaining the elements and dynamics of primary and secondary labor markets); see also DAVID M. GORDON ET AL., *SEGMENTED WORK, DIVIDED WORKERS* 171-75 (1982) [hereinafter *DIVIDED WORKERS*] (tracing the historical development of labor segmentation to the introduction of centralized personnel planning in large firms).

practices like offshore sourcing and increased subcontracting, as well as the use of "team concept" work structures and "just-in-time" production techniques.<sup>27</sup> Indeed, these practices have spread through the American economy at a pace that has led many commentators to conclude that the post World War II structure of capitalist production and accumulation is undergoing a fundamental revolution.<sup>28</sup>

In the United States and throughout the world, the working class has been forced to bear the major burden of economic restructuring. Throughout the 1980s and 1990s, workers and their communities suffered waves of plant closings as primary sector manufacturers relocated production to low-wage nonunion areas in the United States and the Third World. These closures devastated entire communities, increased homelessness, destroyed families, and plunged local economies of dependent suppliers, distributors, and service contractors into bankruptcy. Remaining companies have repeatedly capitalized on the fear, despair, and powerlessness engendered by the threat of additional closures by extracting significant concessions from labor unions, local government officials, suppliers, and most everyone else with whom they deal. Like plant closures, these concessions are extracted in order to lower costs and increase profits at the expense of workers, their families, and their communities.

The U.S. labor movement, by contrast, has for much of this time, been mostly on the defensive.<sup>29</sup> As U.S. corporations change their organizational structures as well as their patterns of investment and production, U.S. labor organizations have been finding it harder and harder to influence the decisions which most directly affect terms and conditions

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27. See MIKE PARKER & JANE SLAUGHTER, CHOOSING SIDES: UNIONS AND THE TEAM CONCEPT 3-30 (1988) [hereinafter CHOOSING SIDES] (providing detailed critical analysis of team concept work structures and "just-in-time" production schedules and their impact in undermining union power and solidarity both among union workers and between union and non-union workers); see also *infra* notes 39-40 and accompanying text.

28. See generally MICHAEL J. PIORE & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY (1981) (arguing that American economic deterioration results from the limits of models of industrial development founded on mass production and mapping two alternative trajectories for relaunching economic productivity and growth in advanced economies); DIVIDED WORKERS, *supra* note 26, at 2-18 (arguing that current economic restructuring must be evaluated in light of the fact that American capitalism has experienced at least three earlier periods of sustained economic crisis, providing historical account linking current inability of the American working class to develop a unified agenda for combating current projects to restructure economy in the image of a dominant business elite to the internal disunity among working class people, and arguing that this disunity is directly linked to the ways in which American labor/management strategies re/organized work and re/structured labor markets in response to these three earlier periods of crisis in the historical development of American capitalism).

29. See ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 5-6 (Kate Bronfenbrenner et al. eds., 1998) [hereinafter ORGANIZING TO WIN].

of employment—indeed, the very existence of employment in the United States. This is partly because the legal structure of American labor relations disproportionately empowers management and restricts the exercise of collective power by American workers.<sup>30</sup>

In the United States, management's ability to transform economic relations is greatly facilitated, and to a large extent depends upon, a legal ideology that equates unfettered management discretion with economic efficiency and ultimately with the "public good." Despite the fact that workers, community groups, and local governments are deeply affected by the investment decisions of private for-profit corporations, American courts have repeatedly rejected the various legal claims through which affected labor and community groups have attempted to influence the outcomes of these "private" decisions.<sup>31</sup> Indeed, the relative powerlessness with which labor and community groups confront corporate decision makers is, itself in large part, an artifact of judicial construction. This is because courts have systematically and cumulatively eliminated most avenues of legal recourse that might otherwise alter the institutional class structures through which private corporate managerial discretion dominates and otherwise preempts community participation in "private" economic decisions.<sup>32</sup>

Numerous legal scholars have criticized the courts' public/private ideology as fundamentally incoherent and class biased.<sup>33</sup> However, the underlying ideology also embraces a whole range of assumptions concerning the institutional prerequisites for economic efficiency.<sup>34</sup> As a

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30. See generally Francis Lee Ansley, *Standing Rusty and Rolling Empty: Law, Poverty and America's Eroding Industrial Base*, 81 GEO. L.J. 1757 (1993) (analyzing doctrinal devolution expanding the scope of employer unilateral control over "core entrepreneurial business decisions" such as whether to sell, close or relocate a business); Elizabeth M. Iglesias, *La Transformación Económica y El Movimiento Obrero Estadounidense*, 4 EL OTRO DERECHO 5, 9 (1992) [*Economic Transformation and the American Labor Movement*] [hereinafter *La Transformación Económica*] (arguing that "[n]o account of the 'deindustrialization of America' is complete without a close look at the legal framework and the underlying ideological assumptions through which the American judiciary has repeatedly protected the mobility of capital at management's exclusive discretion and reaffirmed the predominance of capitalist accumulation over community interests").

31. See, e.g., *Local 1330 United Steel Workers of America v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) (refusing to recognize community property rights as a basis for enjoining management to sell a factory it had decided to close despite evidence the firm was still profitable and closure would have a devastating impact on the community that had assisted the company with public subsidies and other "givebacks").

32. See *Global Markets, Racial Spaces*, *supra* note 17.

33. See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 113-24 (1984) (noting and rebutting the critique that Klare's analysis was based on questionable assumptions about the radical nature of the Wagner Act); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) [hereinafter, *Judicial Deradicalization*].

34. See generally *The Anti-Political Economy*, *supra* note 21 (deconstructing the representation of "economic efficiency" and "free market competition" through an

result, the future of American working people and communities depends, at least in part, on reconstructing domestic labor law regimes and the ideological prejudices and assumptions that inform its routine articulation in specific socio-legal contexts.

More fundamentally, American labor must find ways to overcome the deep divisions, which the last twenty years of economic dislocation and managerial strategic responses have driven into the working class consciousness. Three particularly popular managerial "innovations" of the 1980s illustrate the point in compelling detail: (1) the importation of Japanese production techniques like the team concept and "just-in-time" production scheduling; (2) the introduction of two-tiered compensation systems; and (3) plant relocations to non-union low wage areas in the United States and the Third World. Each of these three strategies shares a common element—each seeks to increase profits by capitalizing on power differentials across distinct sectors of the working class, both within and beyond the United States.

#### *A. Plant Relocation*

Plant relocations increase profits by exploiting the relative powerlessness of non-unionized and Third World workers as compared to unionized workers in advanced industrial countries. The story of American plant closings is a particularly instructive window into the politics of division at an international level. Management advocates often characterize plant relocations as a necessary response to increased competition from Third World producers. In this account, the low wages accepted by Third World workers give Third World producers a comparative advantage in labor intensive production. Confronted by cheaper (and often better) foreign products, American companies blamed their lack of competitiveness on the high wages commanded by a militant domestic labor movement. Offshore sourcing was promoted as the obvious solution.

By relocating to low wage areas, American firms seek to internalize the comparative advantage of their Third World competitors, namely a low wage labor force. However, offshore sourcing affords only a temporary advantage because the higher profits are not based on permanent manufacturing improvements or technological innovations. Instead, plant relocations to non-union areas are just another way to increase profits by "sweating" the workforce. This reality is disguised, however, by characterizing plant relocations as a vehicle for Third World economic

development. In this context, plant relocations are called "foreign direct investment." The arguments are simple. Foreign direct investment creates employment in underdeveloped countries. Employment generates income. Income stimulates demand, which in turn encourages investment, and eventually results in a diversified local economy. Thus, from this perspective, the relocation of American businesses to Third World countries is cast as an engine of Third World development.<sup>35</sup>

Plant relocations do create employment in the Third World, but at exceedingly low wages. American multinationals operating there have made it clear that their continued presence depends on wages remaining low. Indeed, despite dirt-cheap wages, Ford workers at the plant in Hermosillo, Mexico were forced to strike for thirty-nine days when Ford refused to pay a legally required cost-of-living increase.<sup>36</sup> Ford workers involved in union struggles for higher wages and safer working conditions have also been met with violence.<sup>37</sup> As a result, it is unlikely that this form of "foreign direct investment" will generate any meaningful or sustainable economic development in the Third World.

Foreign direct investment appears even more questionable as a development mechanism when compared to other alternatives—specifically those aimed at encouraging domestic producers. Compared to domestic producers, foreign capitalists routinely tend to repatriate profits for investment or distribution in their home countries, rather than reinvesting in the local economies of the host country.<sup>38</sup> Moreover, foreign investment (especially investment involving plant relocations) is often aimed at establishing production platforms for export markets in the First World, rather than for local consumption needs. In short, plant relocations operate as a profit-maximizing strategy by capitalizing on the relative powerlessness and desperate economic situation of the most vulnerable workers in the world, even as the dominant ideology enables American businesses to represent themselves as the champions of competitive efficiency and economic development against the special interests of an unproductive and parochial labor union aristocracy.

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35. See generally NCAA, REPORT ON THE AMERICAS: THE NEW GOSPEL NORTH AMERICAN FREE TRADE, VOL. 26, NO. 6 (May 1991).

36. See CHOOSING SIDES, *supra* note 27, at 217-218.

37. See M. Witt, *Auto Workers Mount Continental Protest*, CANADIAN DIMENSION, Apr.-May 1991, at 32; see also Kathy McAfee, STORM SIGNALS: STRUCTURAL ADJUSTMENT AND DEVELOPMENT ALTERNATIVES IN THE CARIBBEAN 85-86 (1991) (describing tactics used by foreign factory owners to suppress worker unionization and demands for higher wages in Caribbean Free Trade Zones—including threat of plant relocations).

38. This problem has long been well understood. See THEODORE H. MORAN, MULTINATIONAL CORPORATIONS AND THE POLITICS OF DEPENDENCE: COPPER IN CHILE 102-03 (1974) (discussing how Kennecott used profits from its Chilean operations to finance construction of a copper refinery in Maryland in order to refine Chilean copper in Maryland, rather than in Chile).

### B. "Just-in-Time" Production Scheduling

Similarly, the increased profits attributed to "just-in-time" production techniques are derived, at least in part, from substantial wage differentials between unionized firms and their nonunion subcontractors.<sup>39</sup> Just-in-time is a popular name for Japanese inventory and assembly-line production systems in which productive divisions do not produce until they receive signals that more parts are needed by the next division down the line. Business magazines promote this approach as a generally applicable strategy for increasing productivity and competitiveness. However, a close analysis suggests that just-in-time production methods increase profits only because they facilitate speed-ups and externalize the costs of production. A brief comparison with traditional productive systems provides a useful illustration.

In traditionally organized mass production assembly lines, the main objective is to keep the line going at all costs. Stopping the production line is like inducing a heart attack because the profitability of assembly line mass production depends on maintaining maximum output at all times. Consequently, everything in the traditional assembly plant is organized to keep the line going. Each productive division tries to maintain an adequate stock of essential input parts to insulate itself from problems in preceding divisions. Temporary workers are employed to fill in for absentees. When defective work or materials are observed, workers often fix them later, rather than to stop the line, even though defects may be harder to reach at a later point in time. In short, traditional manufacturing plants are managed to keep production going by keeping extra resources on hand.

Just-in-time is a very different system based on a very different philosophy.<sup>40</sup> The basic premise is that maintaining extra resources wastes

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39. For a more detailed description of "team concept" and "just-in-time" production processes and their implications for union power and worker solidarity, see CHOOSING SIDES, *supra* note 27, at 3-30; *La Transformación Económica*, *supra* note 30, at 18-23. See also Doug Gamble & Nina Gregg, *Rethinking the Twenty-First Century Workplace: Unions and Workplace Democracy*, 1 U. PA. J. LAB. & EMP. L. 429 (1998) (arguing that genuine workplace democracy requires institutionalization of procedures for workers to influence basic business and production decisions traditionally reserved to management discretion without management domination); Susan Sturm, *Race, Gender and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 646-51 (1998) (exploring the way racial and gender dynamics influence decisional processes in self-governing teams).

40. Unlike traditional firms, firms using just-in-time methods encourage workers to stop the line whenever they see any trouble. The theory is that it is better to stop production than to allow defective products to slip through. In fact, stopping the line is a tactical strategy for constantly identifying and eliminating extra slack in the assembly line. Just-in-time managers get worried if the line never stops because this means either that the line has too many extra resources or that problems are slipping through uncorrected. The solution is

money and reduces productivity. The main objective is to identify and eliminate any extra slack at any given point in the production process. Rather than maintaining inventories of extra parts, management reorganizes its supply systems to ensure that parts arrive only when they are needed for actual production. In many cases, this means shifting the costs of maintaining inventories to the smaller satellite supplier firms, which are required to deliver directly to the assembly line two and three times a day. This practice increases the smaller firms' costs, increasing their incentive to continue paying low wages and thereby maintaining (if not increasing) the primary and secondary sector wage differential.<sup>41</sup>

This analysis suggests that American firms can only afford to implement just-in-time techniques if they are supported by dependent suppliers who are willing to internalize the costs of assuring on-time delivery numerous times a day. Not every firm has the economic power to shift these costs to their suppliers (and the suppliers' employees). It is, therefore, not surprising that large American automobile manufacturers were at the cutting edge of introducing the just-in-time technique. These firms have the kind of economic power needed to compel their suppliers to adjust to these new demands and the type of mobility which allows them to play workers, in different parts of the country and across the globe, against each other. Many American union workers have accepted these new practices out of fear that the company will simply relocate if the workers oppose them. They have good reasons for their fears. The Toyota-GM joint venture, called NUMMI (New United Motors Manufacturing, Inc.), was one of the first plants to implement just-in-time techniques in the United States.<sup>42</sup> This plant opened in Fremont, California in 1984 in an old GM plant that had closed two years earlier. Most of the workers at NUMMI had worked at the GM plant before it closed. Despite the difficult working conditions, these workers had no desire to oppose the new practices, in large part because they were so frightened that the plant might close.<sup>43</sup>

### C. *Two-Tiered Compensation Systems*

Like plant relocations and just-in-time production techniques, two-tiered compensation systems are another way of increasing profits by

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to remove resources, for example, by eliminating some workers and redistributing their jobs. As resources are removed, problems appear; when they do, management analyzes and corrects them, then resumes production with fewer employees, who now work harder than before. See CHOOSING SIDES, *supra* note 27, at 16-17.

41. See *id.* at 25.

42. See *id.* at 16.

43. See *id.* at 111.



exploiting the lower wages of a disempowered sector of the labor force.<sup>44</sup> Union collective bargaining agreements have traditionally allocated wages, transfer rights, job security, and other employment benefits through a seniority based system in which less senior workers receive lower compensation than their more senior coworkers. However, under the traditional system, less senior workers can eventually expect to earn the same wages and benefits enjoyed by their more senior coworkers as they accumulate seniority. In contrast, two-tiered compensation systems are structured so that the lower-tier and upper-tier workers are on *completely different tracks*. In these systems, lower-tier workers (namely, new hires) earn less compensation and have less job security than their upper-tier coworkers at each level of seniority, unless the collective bargaining agreement has a "catch-up" provision.

Two-tiered wage compensation systems allow management to increase profits at the expense of new hires. New employees are the least powerful workers in the firm, and increasing proportions of such employees are women and racial minorities. These systems are worth particular attention for two additional reasons. First, two-tiered systems are often introduced through collective bargaining agreements negotiated with union representatives. Faced with management's ostensibly nonnegotiable demands to reduce total labor costs, unions must choose whether to spread the burden throughout the workforce or impose the entire burden on a particular group. Given this choice, unions have favored the interests of existing workers at the expense of future workers and the long term interests of workers as a class. In other words, the economic subordination of one group of workers is determined by the superior institutional power of another.

Two-tiered compensation systems are also significant precisely because they are entirely legal. A union's power to subordinate the interests of one group of workers to the interests of another is theoretically limited by law. The judicially constructed duty of fair representation prohibits unions from intentionally discriminating against any members of the bargaining unit.<sup>45</sup> By implication, however, the doctrine of fair representation authorizes union decisions favoring one group over another, absent "invidious discrimination." However, if unions did *not* have this authority, management's attempts to shift adjustment costs onto labor would undoubtedly face a much more unified and militant workforce since the more powerful workers would be just as affected as the least powerful

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44. See generally Note, *Two-Tier Wage Discrimination and the Duty of Fair Representation*, 98 HARV. L. REV. 631 (1985).

45. See *Structures of Subordination*, *supra* note 12, at 447-57 (criticizing judicial interpretation of the duty of fair representation as profoundly inadequate to ensure rights of minority workers in majoritarian unions).

workers. Thus, by authorizing union elites to make these kinds of trade-offs among workers, American labor law ensures that American labor unions will not represent an undifferentiated working class agenda, but will instead operate like administrative agencies allocating burdens and benefits between competing interests at the service of management's "bottom line."<sup>46</sup> A renewed labor movement in the United States, thus depends in part upon reconstructing the legal framework within which unions operate.

The three managerial innovations and profit maximizing strategies reflected in the proliferation of plant relocations, the introduction of just-in-time production techniques, and the establishment of two-tiered wage systems reveal the degree to which the project of increasing American business profitability has been built on strategies that divide the working class and exploit its least powerful sectors. Viewed cumulatively, these various practices reflect strategic decisions to meet the challenges of increased inter-capitalist competition by competing, in one way or another, on the basis of lowered labor costs. However, competition based on eliminating jobs and lowering wages has had disastrous macroeconomic consequences both for working class communities in the de-industrializing north and for sustainable economic development in the impoverished communities of the southern United States and the Third World countries to which these jobs have often been exported.<sup>47</sup>

Equally important, this form of competition cannot sustain stable, long-term prosperity. This is because the loss of high-wage production jobs drastically reduces effective demand in the First World, even as dirt-cheap wages mean ineffective demand in the Third World as well. Third World workers are increasingly producing goods, which they themselves cannot afford to buy,<sup>48</sup> for export to First World markets where

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46. See generally George Feldman, *Unions, Solidarity, and Class: The Limits of Liberal Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 187 (1994); Richard Michael Fischl, *Self, Others and Section 7: Mutualism and Protected Protest Activities Under the NLRA*, 89 COLUM. L. REV. 789 (1989).

47. See, e.g., Roberto L. Corrada, *A Personal Re/View of Latino/a Identity, Gender and Class Issues in the Context of the Labor Dispute Between Sprint and La Connexion Familiar*, 53 U. MIAMI L. REV. 1065 (1999) (recounting Sprint's relocation to escape unionization).

48. See, e.g., Richard Peet, *The Geography of Class Struggle and Relocation of U.S. Manufacturing Industry*, in INTERNATIONALISM AND INDUSTRIAL RESTRUCTURING 40-65 (Richard Peet ed., 1987). Peet notes that the reduction in worker income resulting from plant relocations to non-union low-wage areas "weakened the central determining relationship between mass consumption and the capital goods industries at the center of the world capitalist system. Increasingly, peripheral low-waged workers produced commodities which they themselves could not afford to buy, but central workers also could no longer afford because high-paying unionized jobs were fast disappearing." *Id.* at 64 (emphasis added); see also STORM SIGNALS, *supra* note 37, at 42 (noting that Caribbean women factory workers "could hardly afford to buy the clothes they cut and stitch for 60 cents an hour or less, even if the garments were for sale locally").

consumption is sustained by a bubble economy of consumer credit.<sup>49</sup> Ultimately, then, the internationalization of the American economy means that a strong American labor movement and economically sustainable communities depend on the development of new institutional and procedural arrangements for promoting trans/national labor solidarity and for enforcing basic social and economic rights across the various and varied inter/national regions where American businesses compete.<sup>50</sup>

#### D. Application to the Greensboro and New Haven Case Studies

Against this backdrop, the two case studies featured in this Symposium provide a valuable point of reference for examining the possibilities and obstacles confronting the future of the American labor movement in general, and of multi-racial, interclass, labor/community coalitions in particular.<sup>51</sup> These two case studies recount the coalescence of labor/community coalitions in reaction to a series of labor/management disputes arising from the labor practices and policies of two business enterprises: a Kmart distribution center in Greensboro, North Carolina and the OMNI at Yale in New Haven, Connecticut.<sup>52</sup> In doing so, they

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49. See, e.g., Henry J. Sommer, *Causes of the Consumer Bankruptcy Explosion: Debtor Abuse or Easy Credit?*, 27 HOFSTRA L. REV. 33, 37-38 (1998) (linking increased consumer bankruptcy cases to massive marketing of credit cards, itself, spurred by increased spread between credit card interest rates and cost of funds to lenders).

50. See Francis Lee Ansley, *Rethinking Law in Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 410-13 (1998) (delineating eight different strategies proposed and/or implemented to promote internationally effective labor rights); *The Labyrinth of Solidarity*, *supra* note 14, at 1112-13 (noting that internationalization of business requires internationalization of the labor movement); Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debate*, 28 U. MIAMI INTER-AM. L. REV. 361, 366-76 (1997) (analyzing four alternative models for linking enforcement of labor rights to trade and finance regimes regulated by international economic law).

51. See generally Warren & Cohen, *supra* note 2; Hair, *supra* note 2.

52. It is interesting that the labor/community coalitions featured in these two case studies focus on labor/management disputes in sectors traditionally marginal to the post-WWII labor agenda. These struggles center around service sector workers in business enterprises particularly linked to the local economies in which they are situated, rather than manufacturing industries producing for national and international markets. Distribution centers, like the Kmart center in Greensboro, service regional retail outlets, while hotel and conference services, like those offered by the Omni at Yale, depend on visitors to the local area. The fact that these kinds of business enterprises are inherently less "mobile," than manufacturing industries (though not entirely immobile) makes them prime candidates for labor organizing initiatives, precisely because mobility has so often been the threat used to suppress union activities and extract concessions. But for the devaluation of labor market sectors occupied by women and minorities, it would seem obvious that union organizing strategists would target such sectors as part of a broader strategy of countering the politics of concession and promoting more a militant and proactive labor consciousness and movement. See *The Labyrinth of Solidarity*, *supra* note 14, at 1107-08 (noting that labor

foreground the interdependence and connection between worker struggles for economic justice and the general interests of all citizens in sustainable livable communities. They celebrate the solidarity concerned and courageous people can produce through their collective actions and commitment to a common struggle. They also underscore the substantial challenges still facing our efforts to move beyond an ad-hoc politics of interest convergence to a genuine ethic of mutual recognition. One major challenge, in particular, is clearly evident. That is the challenge of envisioning and achieving the *legal* institutionalization of more appropriate procedures and effective venues for the kinds of inter-group collaborations without which both the labor movement and the many marginalized communities throughout this country will remain hostage to the vulnerability of disaggregation and fragmentation.<sup>53</sup>

The Greensboro and New Haven case studies each tell the story of the way common interests shared by labor and community groups are often misapprehended as a result of the fragmentation produced by an ideology of "separate jurisdictions" and a politics of division. In both cases, public discourse and community sentiment readily cast the workers' struggles for union representation and basic justice in the workplace as just another instance of special interest politics. The workers' demands for justice were initially deemed irrelevant to the broader community in which they lived. Indeed, their union organizing efforts were viewed as affirmatively inimical to the broader community's compelling interest in revitalizing the local economy and maintaining public order.

One ready explanation for why the broader communities in Greensboro and New Haven failed to see their own interests and identities implicated in the workers' struggles lays the blame for community disengagement on the exclusionary visions of community that have truncated the transformative potential of the labor movement, on the one hand, and the civil rights movement, on the other.<sup>54</sup> Indeed, the New

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strategists need to critically assess the degree of enterprise mobility in different sectors and industries, rather than simply acquiesce to threats of closure and relocation, since "certain types of manufacturing businesses are extremely sensitive to their locations . . . [and] cannot easily pack up and move away to avoid a union without jeopardizing their access to important markets").

53. See, e.g., *Structures of Subordination*, *supra* note 12, at 498-502 (explaining how jurisprudential fragmentation of Title VII and the NLRA is directly linked to the political fragmentation currently dividing the labor movement from other progressive social movements and explaining how jurisprudential unification of these regimes would support the development of an institutional framework for more effective and meaningful collaboration between the labor movement and others like the civil rights and feminist movements).

54. See Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and*

Haven case study makes this point explicitly. The authors recount the resistance HERE union leaders confronted from New Haven community leaders in 1996, when the union requested community support in their struggle against Yale University's plans to contract out 600 union jobs to a non-union employer. Previously, these same community leaders had responded quite positively to the union's earlier requests for support in organizing a bargaining unit of Yale's clerical and technical workers. This second time around, however, community leaders resisted the union's request for support because the union had been noticeably absent from important community justice struggles that had arisen in the interim.<sup>55</sup>

To deal with this community non-response, the union had to devise and implement a new organizing strategy that could effectively reveal how deeply the interests and future prospects of the broader New Haven community were directly implicated in the union's struggle against Yale's plan to out-source union jobs to a non-union contractor. By establishing neighborhood organizing communities, holding meetings in the neighborhoods where union members lived, and raising community consciousness of the direct link between the loss of union jobs and the economic decline of the communities that depended on these workers' income, the union was able to overcome the fragmentation that its own lack of attention to broader community struggles had helped to generate.<sup>56</sup>

In retrospect, this organizing strategy was clearly a necessary and appropriate response to the particular situation the union encountered. The union's ability to engage in a self-critical analysis and to learn from the consequences of its previous practices also reflects the appropriateness of attributing the problem of political fragmentation to the elitist actions and exclusionary attitudes of labor union elites. There is no question that the decline of union membership and the labor movement's increasing ineffectuality are, in part, attributable to the truncated politics that produced a formal retreat from any effort to effectuate a broad and inclusive vision of

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*Civil Rights Law*, 61 OR. L. REV. 157, 162-64 (1982) (attributing the labor movement's weakness to its failure to oppose racism and the civil rights movement's weakness to its failure to engage class); cf. *Foreword International Law*, *supra* note 20, at 181 n.4 (stressing the point that race- and class-based essentialisms that have divided the civil rights and labor movements are not just matters of limited consciousness, but also constitutive elements, that are structurally embedded in the institutional arrangements that channel the enforcement and articulation of civil rights and labor rights into very different, and discontinuous, projects and processes); *Structures of Subordination*, *supra* note 12, at 398-403 (developing a comprehensive critique of the way labor/community solidarity has been fragmented by the class-based essentialism of the labor movement and the race-based essentialism of the civil rights movement, but attributing both to the "structural violence" produced by "the politics of interpretative fragmentation" that has denied these movements the institutional framework in which to establish genuinely meaningful collaborative relationships).

55. See Warren & Cohen, *supra* note 2, at 640-41.

56. See *id.* at 641.

social and economic justice. When the labor movement decided to focus primarily on the terms and conditions of employment affecting certain privileged sectors of the American workforce, it settled for a morally uninspired and politically regressive form of "business unionism."<sup>57</sup> Attributing the labor movement's current isolation from other progressive social movements, both within and beyond the United States, to its failure to take its own purported commitment to solidarity and mutual assistance seriously enough—or to define its solidaristic commitments broadly enough may, thus, encourage unions to change their attitudes and practices in ways that can actually make a difference, as demonstrated by the success of HERE's innovative community-based organizing efforts in New Haven.

It is also true that, viewed against a backdrop of perennial debates over the relative significance of structural constraints and the possibilities of agency in the process of social transformation, locating the problem of labor/community fragmentation in the politics and practices of labor union elites emphasizes the role of agency.<sup>58</sup> If the problem is a failed consciousness, then the solution is a new consciousness.<sup>59</sup> This emphasis on consciousness-raising is also reflected in the struggles of the Kmart workers in Greensboro.

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57. See, e.g., BETH SIMS, *WORKERS OF THE WORLD UNDERMINED: AMERICAN LABOR'S ROLE IN U.S. FOREIGN POLICY* 4-6 (1992) (recounting how business unionism was born of Samuel Gompers call for "trade unionism pure and simple"). Sims notes that "[b]y emphasizing narrow, sectoral interests, business unionism tends to isolate groups of workers from one another. It likewise hampers the creation of coalitions with other sectors in society, such as environmental activists, or the homeless and unemployed." *Id.* at 4-5. Sims later adds that "[a]s alternatives to class-based analyses, the AFL-CIO and its institutes offer prescriptions for 'apolitical' trade unionism aimed at increasing the size of the pie through enhanced productivity and labor's piece of the pie through collective bargaining. This promotion of a so-called apolitical trade unionism, however, is a political choice with political outcomes. Refusing to question the underlying assumptions and relationships of capitalism, the U.S. federation has demonized radical responses to capitalist exploitation and failed to come to grips with the fact that misery breeds militancy. In doing so, the AFL-CIO has, intentionally or not, supported the global economic and political status." *Id.* at 6. For a brief account of an alternative vision of unionism espoused by the Knights of Labor and the early CIO, see KIM MOODY, *AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM* xiv-xv (1988).

58. See, e.g., *Foreword: LatCrit III*, *supra* note 7, at 612-13 & nn.82-88 (reflecting on significance of structure versus agency in the process of social transformation).

59. See BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 47 (1994) (discussing the importance of consciousness raising and ideological evolution in the process of social transformation and individual self-determination); cf. *Global Markets, Racial Spaces*, *supra* note 17, at nn.18-24 and accompanying text (stating that human agency and the will to flourish may produce moments of revolutionary change, but social justice and the profound and lasting transformations upon which justice ultimately depends require new institutional arrangements, whose procedures and substantive norms can make the articulation and enforcement of emancipatory values a routine practice *internal* to the institutional decision making processes at issue, rather than a matter of extraordinary *external* mobilization by excluded interests and voices).

Like the Yale workers in New Haven, the Kmart workers confronted a community that was, at best, non-responsive and in some instances positively hostile to their efforts to challenge, expose, and transform the allegedly unsafe working conditions and abusive employment practices to which they were subjected. However, in this case, the political fragmentation that initially marked the relationship between the Kmart workers and the broader community was not directly attributable to any particular union's prior relationship with the Greensboro community. The Kmart workers were unorganized. Indeed, their initial efforts to enlist union assistance in organizing the Kmart distribution center fell on deaf ears.<sup>60</sup> Instead, in this case, the truncated consciousness that initially blinded the Greensboro community to the Kmart workers' compelling claims of justice reflects the social dominance of a generalized anti-union ideology and the material realities of power and privilege that have stripped *the meaning* of community of its solidaristic implications and reduced the practice of "community building" to a competition for business investments.

Like the Omni workers in New Haven, Kmart workers confronted a community caught in a virulent race to the bottom, itself triggered by the hyper mobility that has unleashed capital from labor<sup>61</sup> and has enabled the project of community development to be disfigured into a profit-maximizing enterprise.<sup>62</sup> In both instances, the Kmart and OMNI workers were up against employers that had been affirmatively recruited into the community by public subsidies and concessions.<sup>63</sup> Community elites,

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60. Several unions turned down the Kmart workers before the American Clothing and Textile Workers Union (ACTWU) agreed to represent them. Their collective bargaining representative is now called UNITE, which was formed through a merger between ACTWU and the International Ladies Garment Workers Union (ILGWU). See Hair, *supra* note 2, at 662. For an analysis of the way judicial interpretation of federal labor laws has created a legal structure that enables unions to avoid organizing labor units and sectors occupied by women and minorities, see *Structures of Subordination*, *supra* note 12, at 439-45.

61. See, e.g., A. Sivananda, *All That Is Solid Melts into Air: The Hokum of New Times*, RACE & CLASS, Jan.-Mar. 1990, at 8-9 (arguing that "[w]hat is crucial here is not that the productive forces have altered the balance of dependency between Capital and Labour, but that they have altered it so radically as to allow Capital to free itself of Labour and yet hold Labour captive").

62. See, e.g., CHICAGO, *supra* note 19, at 16-17; RANDY STOECKER, DEFENDING COMMUNITY: THE STRUGGLE FOR ALTERNATIVE REDEVELOPMENT IN CEDAR-RIVERSIDE (1994) (locating the emergence of militant interclass coalitions to combat the commodification of city habitat to a critical analysis of the impact of capitalist profit-maximizing logic that reduces the process of community development to the production of exchange values, rather than use values, and its negative consequences for sustainable and livable communities).

63. See Warren & Cohen, *supra* note 2, at 643-44 (recounting concessions to Omni); Hair, *supra* note 2, at 661 (noting concessions Kmart negotiated from the city and county including construction of roads and public water lines to the site).

informed by and invested in an elitist and exclusionary project of "economic development," had a whole range of stock responses readily available for dismissing the plight of the Kmart workers and for delegitimizing their efforts to combat the alleged abusive and discriminatory employment practices at the Kmart distribution center. Elected officials refused to intervene on the grounds that the matter constituted a labor/management dispute. The voice of "public opinion" decried the negative impact that labor unrest and public disruptions, orchestrated by interfering "outsiders," would have on external perceptions of the community's stability. Thus, the workers' struggles were readily cast as threats to the broader community's compelling interest in creating an attractive environment for business investment.

Leaders of the faith community were also vulnerable to rhetorical misrepresentations of their motives and actions. Rather than acknowledging the courage it takes to take a stand on behalf of any isolated, marginal and powerless group of persons, religious leaders who worked to mobilize community moral sentiment on behalf of the Kmart workers confronted yet another discourse of fragmentation. This discourse pretends to separate the moral from the political. In other words, they, like others before them and others still to follow, were told to stick to the otherworldly matters of promoting faith and morals, rather than fomenting a politics of human self-assertion and self-determination among the marginalized and dispossessed workers of Greensboro.<sup>64</sup>

In short, the Greensboro case study reveals the vast array of rhetorical strategies through which community elites sought to isolate the Kmart workers, to discourage community concern for their plight, and to delegitimize the unselfish acts of courage through which leaders of the faith community sought to express their solidarity with the Kmart workers. The

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64. For reflections on the relationship between religion and the theoretical and political commitments of the LatCrit project, see Keith Aoki, *(Re)Presenting Representation*, 2 HARV. LATINO L. REV. 247 (1997); Max J. Castro, *The Missing Center? Cuba's Catholic Church*, 19 CHICANO-LATINO L. REV. 493, 500 (1998) (noting that the Catholic Church does not always play a liberating or anti-subordination role in Cuban society); Elizabeth M. Iglesias & Francisco Valdes, *Afterword: Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503, 511-45 (1998) (noting same and giving further examples of complicity of organized religion in the perpetuation of racial subordination and political repression); Kevin R. Johnson, *Foreword—Celebrating LatCrit Theory: What Are We Going to Do When the Music Stops?*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000); Guadalupe T. Luna, *Gold, Souls and Wandering Clerics: California Missions, Native, Californians and LatCrit Theory*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000); Laura M. Padilla, *Latinas & Religion: Subordination or State of Grace?* 33 U.C. DAVIS L. REV. (forthcoming Spring 2000); Terry Rey, *The Virgin's Slip is Full of Fireflies: The Multiform Struggle over the Virgin Mary's Legitimierende Macht in Latin America and its Diasporic Communities*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000).



fact that the Kmart distribution center was *ultimately* unionized gives witness to the power of human agency in the face of overwhelming odds and the structural asymmetries of power that produce them.<sup>65</sup> However, the fact that members of the faith community had to *get arrested* to make this change possible speaks to the fundamental injustice of an institutional reality in which the structural asymmetries of power exact such extraordinary sacrifices and demand such extraordinary courage.

Indeed, while the Greensboro case study attests to the personal power and ethical integrity of those particular individuals, who can and do transcend their context, it also constitutes damning evidence of the substantive and procedural injustice embedded in the institutional structures that currently constitute the American political economy. Existing institutional arrangements are fundamentally unjust precisely because they produce asymmetries of power that make the achievement of basic justice depend on such extraordinary efforts. Institutionalizing social and economic justice requires more. Ultimately, it requires institutional arrangements that provide effective venues and procedures for achieving just solutions *on a routine basis without requiring such extraordinary efforts*.

At the same time, the project of producing alternative institutional arrangements is a project that deeply implicates the politics of judicial interpretation. Whatever momentary victory is achieved "on the streets," through government intervention or some legislative enactment, the ideologies embedded in judicial precedents and reproduced by the interpretative practices through which these precedents are applied in adjudication constitute a formidable discursive and material limitation for the project of producing alternative institutional arrangements. It is to these matters that I now turn.

## II. LABOR/COMMUNITY SOLIDARITY AND THE LEGAL PRODUCTION OF SEGMENTED SOCIAL STRUCTURES AND FRAGMENTED POLITICAL COMMUNITIES

In the New Haven case study, Warren and Cohen note the various occasions in which union leaders, who repeatedly sought community support for their own organizing efforts, were visibly absent from important community struggles. Most notably, the union was missing from the broad-based community struggle against a plan to reroute a number of bus stops in order to clear "the congestion" (of large numbers of minorities) in front of the Omni Hotel. The union's failure to commit its attention and

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65. See, e.g., Mutua, *supra* note 5, at 1198-99 (noting how, against all odds, Blacks have long resisted their dehumanization despite the racial dictatorship of white supremacy).

resources to non-union related community struggles undermined community good will and the sustainability of the labor/community coalitions that had proven so crucial to the union's earlier organizing efforts. The union's absence from these community struggles made its subsequent appeals to solidarity and claims of interdependence appear opportunistic and self-serving. To its credit, union leaders recognized the problem and took steps to address it by institutionalizing a community liaison. However, even then, the union still failed to aggressively support community opposition to the training program the OMNI instituted for New Haven residents seeking employment at the hotel.

As Warren and Cohen acknowledge, this dynamic in the relationship between labor unions and community organizations is not unique to New Haven. Indeed, much of the authors' analysis situates this particular case study within a broader theoretical framework that explains why this dynamic occurs so regularly.<sup>66</sup> Unions have often sought community support for their picket lines and boycotts. However, they also have often failed to support community struggles not directly related to union issues and concerns.<sup>67</sup> Nevertheless, union failures to participate reciprocally in community struggles over matters unrelated to the conditions of employment must be analyzed against a history of judicial interpretation that has worked to isolate unions and to narrow the instances in which unionized workers can lawfully exercise economic and political power.<sup>68</sup>

Judicial precedents have imposed significant legal restrictions on union power to conduct secondary boycotts and political strikes;<sup>69</sup> they have expanded the threat of antitrust liability in instances where labor unions coordinate their concerted activities with non-labor groups;<sup>70</sup> they have imported and arbitrarily applied highly indeterminate obligations of employee "loyalty" to employers;<sup>71</sup> and they have substantially restricted

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66. See Warren & Cohen, *supra* note 2, at 631-37 (noting for example, that unions have access to more financial resources to implement their agendas, internal mechanisms of accountability, and member discipline, which enables them to mobilize relatively more effectively than community organizations lacking these financial and institutional resources).

67. See SIMS, *supra* note 57, at 4-6; Feldman, *supra* note 46. See generally ORGANIZING TO WIN, *supra* note 29.

68. See generally Melinda J. Branscomb, *Labor, Loyalty, And The Corporate Campaign*, 73 B.U. L. REV. 291 (1993); Feldman, *supra* note 46; Fischl, *supra* note 46; Jennifer Friesen, *The Costs of 'Free Speech' Restrictions on the Use of Union Dues to Fund New Organizing*, 15 HASTINGS CONST. L.Q. 603 (1988); Seth Kupferberg, *Political Strikes, Labor Law, and Democratic Rights*, 71 VA. L. REV. 685 (1985); James Gray Pope, *Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism and the Living Constitution*, 69 TEX. L. REV. 899 (1991).

69. See Feldman, *supra* note 46; Kupferberg, *supra* note 68; Pope, *supra* note 68.

70. See Pope, *supra* note 68.

71. See Branscomb, *supra* note 68.

the use of union member dues to promote a broad political agenda and even to organize unorganized sectors of the working class.<sup>72</sup> Through the articulation of these precedents, courts have been deeply implicated in the emergence and consolidation of a narrow minded, apolitical, conformist and isolated brand of unionism. The fact that *some* unions have, nevertheless, taken the risk of engaging broader issues and of acting in solidarity with non-labor groups is as unsurprising as the fact that *many more have not*.

As both the Greensboro and New Haven case studies powerfully illustrate, there are always individuals whose personal power and moral integrity compel them to transcend their context. However, the measure of a legal regime's legitimacy is not the fact that justice can be achieved through the agency of persons and communities whose courage, commitment, and generosity impels them, on principle, to risk the consequences of violating the norms and procedures that would otherwise obstruct the achievement of justice. On the contrary, the fact that labor unions in this country have so often, and so thoroughly, failed so many workers and communities because, and precisely to the extent that they do in fact, *obey the law*, indicates why such laws are unjust and must be changed.

Conversely, just as judicial precedents restrict the extent of labor union participation in broader community matters, they also restrict the extent to which community organizations can meaningfully participate in union struggles. Six years ago, I wrote extensively about the way potential solidarities between the labor and civil rights movements had been undermined by judicial interpretation of the doctrine of "exclusive representation,"<sup>73</sup> and, more generally, by the interpretative fragmentation of Title VII and the NLRA.<sup>74</sup> This analysis is directly relevant to the issues raised by these two case studies. It reveals the underlying legal framework through which the politics of fragmentation is formally institutionalized and, therefore, sheds important light on the obstacles confronting Warren and Cohen's objective of transforming the spontaneous ad hoc cooperation that oftentimes characterizes labor/community collaborations into

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72. See Friesen, *supra* note 68.

73. The doctrine of "exclusive representation" is defined by the body of judicial precedents interpreting Section 9(a) of the NLRA, which provides in part that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a) (1994).

74. See *Structures of Subordination*, *supra* note 12, at 404-67.

institutionally sustainable coalitions.

As Warren and Cohen point out, creating sustainable labor/community coalitions depends, in part, on increasing union accountability to the various communities to which their members belong. For this to occur, however, "civil rights and other community organizations must mobilize their own base, particularly that of their membership who are also union members."<sup>75</sup> In other words, community organizations should seek access to, and demand representation of community interests within the union's internal governance structures and decision making procedures through the agency of union members, whose intersectional identities and political commitments make them authentic community representatives. Two brief examples illustrate how the institutional structures established through judicial interpretation currently obstruct this altogether reasonable suggestion.

Increasing union accountability to communities, through the agency of union members who also belong to broader community groups or civil rights organizations, requires that union governance structures and decision making procedures provide meaningful opportunities for these individuals to exercise effective leadership within the union. Though progress has been made in unions like HERE and UNITE, where women and minorities constitute a relatively large percentage, if not a majority, of the union's membership, the leadership of American unions is still disproportionately male and white.<sup>76</sup>

Early efforts to diversify union leadership through affirmative action programs ran afoul of the peculiar way in which courts interpreted the relationship between Title VII, which prohibits employment-related discrimination based on sex, race and other protected categories, and the LMRDA, which was passed to ensure that internal union governance operated democratically.<sup>77</sup> Despite obvious connections between the diversification of union leadership and the goal of fair and equal representation for all the union's constituencies, courts reviewing the legality of challenged affirmative action programs concluded that such programs constituted unreasonable restrictions on the "freedom of candidacy and voting," which the LMRDA was designed to ensure.<sup>78</sup>

These LMRDA precedents constitute a distinct but no less severe restriction on the use of affirmative action programs to diversify union leadership than the restrictions imposed by more recent developments in

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75. Warren & Cohen, *supra* note 2, at 654.

76. See, e.g., LABOR RESEARCH REVIEW 20 (Midwest Center for Labor Research ed., 1993); LABOR RESEARCH REVIEW 11 (Midwest Center for Labor Research ed., 1988).

77. See *Structures of Subordination*, *supra* note 12, at 457-67.

78. *Donovan v. Illinois Educ. Ass'n*, 667 F.2d 638, 640-41 (7th Cir. 1982).

the Supreme Court's unequal protection jurisprudence.<sup>79</sup> This is because the precedents striking down affirmative action programs under the LMRDA are based in some instances on the asserted premise that "there is no relationship between the [race or gender-based] eligibility qualifications and duties of [holding a union office]"<sup>80</sup> and in others, on the asserted unreasonableness of any candidacy qualification that "excludes a majority of the union's membership."<sup>81</sup> Ironically, these precedents, articulated through a discourse of colorblindness and the supposed imperatives of participatory democracy, constitute major obstacles to diversification of union leadership in precisely those unions that most need it. These are unions in which members of racially subordinated communities constitute a distinct and submerged minority, as well as non-responsive unions, whose leadership is entrenched through racist or sexist block voting.<sup>82</sup> To the extent the future of labor/community solidarity depends on increased union accountability to community interests and this increased accountability depends on the effective representation of community interests within unions, these LMRDA precedents constitute major obstacles to the effective institutionalization of labor/community coalitions.

A second example of the way judicial interpretation has institutionalized the fragmentation of labor/community coalitional collaborations can be found in the way judicial precedents have construed the doctrine of "exclusive representation" to preclude establishment of a tripartite system of arbitration and the use of third party intervention in union grievance procedures.<sup>83</sup> William Gould made this proposal shortly after Title VII was first enacted.<sup>84</sup> Such a system might have encouraged civil rights organizations and other organized social groups to develop a stronger stake in the labor movement by establishing an institutional structure through which these external organizations could have effectively participated in the union decisions particularly affecting their members. Through their standing to represent community members in union grievance proceedings, civil rights and other community organizations might have developed a formal presence in the labor movement and a stake

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79. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to all government race-based classifications).

80. *Shultz v. Local 1291, Int'l Longshoremen's Assn.*, 338 F. Supp. 1204, 1206-07 (E.D. Pa. 1972).

81. *Donovan*, 667 F.2d at 642.

82. See *Structures of Subordination*, *supra* note 12, at 461-64 (deconstructing underlying assumptions and criticizing the anti-democratic impact of these cases and the disenfranchisement they re/produce for women of color and any other subordinated minority group within the union).

83. See *id.* at 498-502.

84. See William B. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969).

in its institutions. At the same time, their participation in the union's governance structures might have made the union's grievance processing system a much more meaningful framework for resolving intergroup conflicts between union members and for reconciling union interests and community concerns. Instead, the doctrine of exclusive representation was deployed to make grievance processing procedures, like collective bargaining, the exclusive prerogative of union officials.<sup>85</sup>

By juxtaposing these two examples of the way judicial precedents enable unions to monopolize institutional power by excluding women and racial minorities from leadership positions and community organizations from their governance structures to the other line of judicial precedents restricting the capacity of labor unions to effectively participate in broader community struggles, this analysis clearly demonstrates the extent to which the politics of fragmentation currently dividing the labor movement from other progressive social movements is an unsurprising real world consequence of the ideology that has long informed judicial interpretation across a wide range of doctrinal contexts. The cumulative impact of these precedents is an institutional framework that substantially restricts the opportunities for labor and community organizations to engage in meaningful collaboration or to invest in each other's struggles. What is needed, instead, are institutional arrangements that enable democratic participation by labor and community coalitions in each other's institutions and projects as well as in the economic decisions and political processes that so directly affect the lived realities of workers and their communities.

In this vein, the New Haven case study provides some excellent suggestions that merit further reflection and development.<sup>86</sup> Warren and Cohen clearly recognize that the problems confronting the project to promote more effective labor/community coalitions have two dimensions. The first dimension of the problem is reflected in the anti-democratic and exclusionary structures of internal union governance. Any effort to promote more effective labor/community coalitions must address this problem by exploring alternative ways of designing the structures and procedures of *internal* union governance. Rather than suppressing the multidimensional identities and collective solidarities that connect individual union members to a broader array of communities *outside* the union, the objective here must be to design new union governance structures that enable union members to *effectively* express their perspectives and represent the interests of these broader communities within the decision making processes of the union.

Effective participation, however, requires more than simply having the

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85. See *Structures of Subordination*, *supra* note 12, at 499.

86. See Warren & Cohen, *supra* note 2, at 653-55.

opportunity to express one's perspective; it also requires a reconfiguration of decision making authority and institutional power within unions that enables these alternative perspectives to have a meaningful impact on the union's policies and agenda. In *Structures of Subordination*, I forwarded such an alternative legal regime by examining three models for institutionalizing anti-essentialist *self-representational structures* which would more fully and fairly permit effective worker self-determination based on a recognition, rather than a suppression, of the multidimensional and intersectional nature of individual political identity.<sup>87</sup>

The second dimension of the problem focuses on the obstacles restricting union participation in broader community struggles. Efforts to address this problem must necessarily target, and ultimately reform, the legal doctrines that currently define the terms and conditions of union participation in broader economic and political forums, struggles and decision making processes *outside* the union.<sup>88</sup> Unions must have the legal right to participate fully and effectively in defining the norms and objectives that will govern the process of community development and determine the terms and conditions of community life—both within and beyond the workplace. Viewed from either perspective, the project to promote effective labor/community coalitions will, as Warren and Cohen note, require the institutionalization of new regimes.

To be sure, institutionalizing these new regimes will undoubtedly depend on the extent to which the labor movement successfully overcomes its prior history of racism, sexism, and business unionism, and invests more aggressively in organizing the vast numbers of unorganized workers in *all sectors* of the inter/national economy.<sup>89</sup> Absent substantial organizing efforts, labor will simply never have the political power it needs to effectuate any meaningful labor reform in this country.<sup>90</sup> However, any meaningful legal reform effected through legislative action is still vulnerable to "deradicalization" so long as current judicial ideologies dominate the future articulation of judicial interpretation.<sup>91</sup>

Against this backdrop, these two lines of judicial precedent and their

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87. See *Structures of Subordination*, *supra* note 12, at 478-86 (comparing and assessing relative advantages of three models for reforming majoritarian decision making procedures: (1) interest group certification; (2) cumulative voting; and (3) separate representational structures).

88. See, e.g., *supra* notes 68-72 and accompanying text.

89. For some hopeful accounts of recent organizing efforts, see generally ORGANIZING TO WIN, *supra* note 29.

90. See *id.* at 7-8 (noting that low levels of unionization have led to loss of political power); see also Margaret Weir, *Wages and Jobs: What is the Public Role?*, in SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF ACTIVIST GOVERNMENT 269-79 (Margaret Weir ed., 1998) (recounting how labor's political weakness impacted the Clinton Administration's calculations of political expediency).

91. See, e.g., Klare, *Judicial Deradicalization*, *supra* note 33.

impact on the de-politicization and fragmentation of labor/community coalitions also make evident the reasons why LatCrit scholars and activists should seriously engage in and lend critical support to labor leaders and community activists seeking new forms of labor/community solidarity. Such efforts to bridge intergroup divisions are completely consistent with the anti-essentialist, anti-subordination commitments of the LatCrit movement. It is also consistent with LatCrit's steadfast emphasis on articulating a theory and practice of authentic coalition building.<sup>92</sup> Involvement in these labor/community struggles makes it increasingly apparent that "essentialism" is not just an ideology that fragments communities and demobilizes collective action by suppressing the expression of intersectional identities and multiple perspectives. It is also a constitutive element of the institutional arrangements we inhabit—precisely because these institutions have been re/produced through the deployment of essentialist ideologies for the purpose of enforcing essentialist agendas.

Even more alarming, these institutions are the "built environments" whose institutional patterns, practices, and customs may outlive the deconstruction and demise of the essentialist ideologies that initially produced them. This may happen because the real world consequences of an ideology oftentimes take on a life of their own in the habitual practices and uncritical reflex reactions of those who inhabit, but do not critically examine the dynamics of, the built environments in which they are situated. This is why combating essentialism means challenging *both* the ideological discourses through which it is expressed *and* the social relations and institutional arrangements that manifest it as a material force in the real world. This is also why critical and self-critical theory, of the sort that LatCrit scholars have striven to articulate, will continue to be of central importance in the process of social transformation.

### III. CONCLUSION

Though LatCrit theory was born of the need to challenge the

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92. See, e.g., Robert S. Change & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CAL. L. REV. 1395 (1997); Jerome McCristal Culp, Jr., *Latinos, Blacks, Others and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479 (1997); Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585 (1997); Iglesias & Valdes, *supra* note 64, at 562-88; Elizabeth M. Iglesias, *The Intersubjectivity of Objective Justice: A Theory and Praxis for Constructing LatCrit Coalitions*, 2 HARV. LATINO L. REV. 467 (1997); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN PAC. AM. L. J. 33 (1995).



essentialist ideology of the Black/White paradigm,<sup>93</sup> the anti-subordination imperative that has been the driving force at the heart of this movement has quickly pushed the substantive agenda of the LatCrit project beyond a narrow agenda of identity politics focused exclusively on issues of discrimination and equal protection. Instead, LatCrit scholars have affirmatively sought to address a much broader array of matters of universal concern to all peoples seeking spiritual, material, and cultural liberation from the violence of subordination, marginalization, and dispossession so pervasive in our societies.<sup>94</sup> It is therefore not surprising that class has repeatedly emerged as a central concern among LatCrit scholars.<sup>95</sup> Indeed, the upcoming LatCrit V Annual Conference in May 2000 will be expressly devoted to issues of class.<sup>96</sup> Moreover, class subordination and its particular forms of manifestation in Latina/o communities were also important themes in the scholarly works produced, both at LatCrit III<sup>97</sup> and LatCrit IV.<sup>98</sup>

This record of LatCrit efforts to link identity politics to an anti-essentialist, anti-poverty agenda that engages issues of class stratification both within and between minority communities, gives witness to the ready

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93. See *Under Construction*, *supra* note 3, at 17-20.

94. See, e.g., *Foreword: LatCrit III*, *supra* note 7, at 584 (reflecting on the significant advances LatCrit scholars have made in linking identity politics to a substantive analysis of numerous issues oftentimes "cast as matters of universal concern, not particularly relevant to Latina/o and other minority communities, whose primary focus of attention has been thought to center on issues of discrimination and the meaning of equal protection" and arguing that "LatCrit theory, by contrast, claims an interest in matters of universal concern, precisely because it rejects the metaphysical and epistemological assumptions that underpin the bifurcation of universal and particular").

95. See Iglesias & Valdes, *supra* note 64, at 574-82 (noting the significance of class in Latina/o subordination and arguing that LatCrit anti-poverty agendas must take into account the particularities of class-based subordination that affect different Latina/o communities in different ways); Rachel F. Moran, *Foreword—Demography and Distrust: The Latino Challenge to Civil Rights and Immigration Policy in the 1990s and Beyond*, 8 LA RAZA 1, 10 (1995) (noting that Latinas/os "often have been attuned to questions of class, rather than race or ethnicity, in formulating a reform agenda").

96. See LatCrit V Conference Theme and Call for Papers, *LatCrit Theory and Praxis in a World of Economic Inequality*, <[HTTP://NERSP.NERDC.UFL.EDU/~MALAVET/LATCRIT/LCVDOS/PAPERS.HTM](http://nersp.nerdc.ufl.edu/~MALAVET/LATCRIT/LCVDOS/PAPERS.HTM)> (centering class in the articulation of LatCrit theory).

97. See, e.g., Corrada, *supra* note 47; Mary Romero, *Immigration, the Servant Problem and the Legacy of the Domestic Labor Debate: Where Can You Find Good Help These Days?*, 53 U. MIAMI L. REV. 1045 (1999).

98. See, e.g., Christopher David Ruiz Cameron, *The Rakes of Wrath: Urban Agricultural Workers and the Struggle Against Los Angeles' Ban on Gas-Powered Leaf Blowers*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000); Tanya K. Hernandez, *An Exploration of the Efficacy of Class-Based Approaches to Racial Justice: The Cuban Context*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000); Pamela J. Smith, *The Tyrannies of Silence of the Untenured*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000); William R. Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farmworkers*, 33 U.C. DAVIS L. REV. (forthcoming Spring 2000).

synergies awaiting further cross-fertilization and collaboration between LatCrit scholars, labor and community leaders, legal scholars, and social scientists that have coalesced around the coalitional project embedded in the New Haven and Greensboro case studies. Both projects center the intersectional identities of minority workers in the transformation of essentialist regimes. Both seek also to bridge lines of division between progressive social movements and ultimately to produce a social reality that gives genuine meaning to human "community."

Just as LatCrit theory cannot effectively evolve without genuine involvement in the real world struggles of subordinated peoples, these struggles may likewise fall short of the mark if they are isolated from the critical perspectives that will enable them to see the broader context of their struggles.<sup>99</sup> For all these reasons, the project to promote labor/community solidarity is a project worth LatCrit attention.

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99. For further thoughts along this line, see *Global Markets, Racial Spaces*, *supra* note 17 (discussing reflections on the land-occupation struggles of the Peruvian poor and the obstacles confronting the revolutionary aspirations of South African grassroots movements); see also *Foreword: LatCrit III*, *supra* note 7, at 599-600 (arguing that the objective and measure of anti-essentialist critical theory is articulating "a broader perspective from which the particular experiences and various claims of different groups can be seen as part of a common struggle for justice").